Supreme Court, U.S.
FILED
APR 16 2002
OFFICE OF THE CLERK

(4)

No. 01-1128

IN THE
Supreme Court of the United States

MICHAEL BLACKARD, SHARON BLACKARD,
AND
ASHLEY BLACKARD,
Petitioners,

V.

MEMPHIS AREA MEDICAL
CENTER FOR WOMEN, INC.
AND DR. FAZAL MANEJAWALA,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. Respondents' argument that Petitioners' cause of action for violation of Tennessee's Parental Consent Act was properly foreclosed by the failure of Tennessee to implement and administer an adequate judicial bypass alternative to the parental consent requirement misconstrues the Court's opinion in *Bellotti*, and adds an "implementation and administration" component not discussed in *Bellotti* or any of the Court's other parental consent abortion decisions.

There is no question that the legislature of Tennessee did everything right. Tennessee's lawmakers enacted a parental consent law which contains an appropriate judicial bypass provision as dictated by this Court's precedent. In seeking to protect minors from their own immaturity, Tennessee requires a court order or parental permission for a minor to obtain an abortion. A Federal District Judge erroneously issued a preliminary injunction enjoining enforcement of the Act, which was later reversed on appeal.[1] The fundamental question

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[1] Respondent MAMCW repeatedly states in its Brief in Opposition that the Parental Consent Act was enjoined. (Resp. MAMCW Brief in Opposition pp. 1-2) Statutes cannot be enjoined since an injuction is a court order for a person to act or refrain from acting enforcable through courts' contempt powers. (See Pet. p. 10) MAMCW confuses a court's injunctive powers with declaratory relief.

before this Court is whether an erroneously issued preliminary injunction acts as a grant of blanket immunity for all persons (party or not) to ignore a duly enacted state statute, free forever from any risk of civil liability. What is the source of power for a federal judge to deny all potential litigants a civil cause of action because of an erroneously issued preliminary injunction against other parties?

What if a federal judge in one district in a state enjoined the governor, the attorney general and the administrative director of the courts from enforcing the state's statutory rape law, on the grounds that it unconstitutionally abridged a mature minor's right to privacy. After all, if a mature minor has a constitutional privacy right to terminate a pregnancy, some district judge could conceivably hold that a mature minor has a corollary privacy right to engage in intimate relations. If a District Judge erroneously preliminarily enjoined a state's statutory rape law, could adults throughout the state start having intercourse with 14 year old girls without fear of prosecution or civil liability? The ruling of the District Court and the Sixth Circuit in this case, if applied to the statutory rape law hypothetical, would lead to a result in which parents of 14 year old girls would be forever barred from seeking prosecution of (or civil damages from) the participating adult. The statutory rape law would not have been "in place" (Resp. MAMCW Brief in Opposition, pp. 8 & 24) during the pendency of the erroneously issued

injunction, because officers of the court throughout the state charged with enforcing the statutory rape law purportedly would have been bound by the injunction.

Respondents center their arguments on the proposition that this Court, by its opinion in *Bellotti v. Baird* 443 US 622 (1979), held that any state statute requiring parental consent before an abortion could be performed on a minor that did not also provide a working judicial bypass procedure would be unconstitutional. In *Bellotti*, this Court did not address whether the State of Massachussetts had actually implemented a judicial bypass procedure, it only considered whether the language of the statute itself was too restrictive, unconstitutionally burdening a minor's rights to an abortion. *Bellotti v. Baird*, 443 at, 647; *see also Lambert v. Wicklund*, 520 US 292, 295 (1997). In this case, Respondent's argue that since a federal preliminary injunction enjoined juvenile court advocates from assisting minors with obtaining a judicial bypass, that the preliminary injunction somehow rendered the Tennessee statute unconstitutional. Taking Respondent's argument to its logical conclusion, it would create a jurisprudence where the constitutionality of a statute would never be certain. After all, under the Respondents' view, if a court appointed advocate died suddenly, and thus there was no one to assist a minor in a particular county with obtaining an abortion on a particular day, the statute would be unconstitutional until a

person was hired to replace the deceased advocate. Likewise, if the telephone service was interrupted in a county due to a power failure, the Parental Consent Act would be unconstitutional during the period of the failure, since the hotline created to assist minors in obtaining abortions without parental consent would not be operable. How are civil courts supposed to determine whether a civil cause of action is available for the violation of the act if the constitutionality of such cause of action is subject to change on a daily basis? It would be strange to hold that the constitutionality of a statute fluctuated depending upon how effectively such statute was presently implemented and operating.

Nowhere does the *Bellotti* opinion (or any opinion discussing the constitutionality of a parental consent statute issued by this Court) address the issue presently before the Court, i.e., whether an admittedly constitutional statute can be eviscerated by an erroneously issued preliminary injunction, especially with respect to non-parties. Despite Respondents' contentions that the District Court decided the issue as a question of fact, the issue of whether the Tennessee Parental Consent Act provided Petitioners with a valid cause of action even during a period in which other parties were enjoined from implementing the Act is a question of law.

II. The District Court held that the Parental Consent Act creates a cause of action.

Respondent Manejwala contends in his Brief in Opposition that the Parental Consent Act does not create a new cause of action (Manejwala Resp Brief, p. 1). The District Court specifically found that the Parental Consent Act created a cause of action for interference with family relations:

> Additionally, the Court discerns an implication in §37-10-307 to create a civil cause of action for violation of the consent act...The Court therefore concludes that the Tennessee legislature intended to create a cause of action for interference with family affairs arising from violation of the Consent Act.

(R. 77, Order, p 8).

On appeal, the Sixth Circuit implicitly agreed with the District Court that the Parental Consent Act created a cause of action, since the entire discussion in the opinion concerns whether the civil aspects of the Parental Consent Act may be enforced in light of the *Planned Parenthood* injunction. If the Act did not create a civil cause of action, there would be no need to discuss whether the civil provisions of the Act were enjoined, since they would be of no effect. Because neither Respondent filed a cross-petition raising this

issue decided adversely to them below, and because the question as to whether the act creates a civil cause of action is not subsumed in any Question Presented framed by any party, it is not properly before the Court. *See* Supreme Court Rule 14.1(a).

III. Respondent's argument that the State of Tennessee represented the Petitioners' interests was rejected by both the District Court and the Court of Appeals, and is not properly before this Court.

Respondent Manejwala argues in his Brief in Opposition that the State of Tennessee represented the Blackards' interests when it defended Planned Parenthood's injunctive relief suit, thereby precluding subjecting Respondents to civil liability for violating the Act. (Resp. Manejwala Brief in Opposition, pp 10-12). This contention is belied by the order entered by the District Court, which specifically held that Tennessee did not represent the Blackard's interests:

> Defendants also contend that Tennessee represented the interests of Plaintiffs in the Middle District litigation and that binding them to the terms of the 1997 injunction works no disservice. ... Plaintiffs at bar, the Blackards are not similarly situated to Tennessee - they seek

> relief through a civil remedy and allege very personal injuries. Therefore, the order enjoining the actions of Tennessee cannot run against the Blackards, who act entirely separately from Tennessee....

(R. 66, Order pp. 6 - 8).

Respondent Manejwala also asserts that "[w]hen a state is party to litigation involving matters of general public interest, the state represents all citizens." (Resp. Manejwala Brief in Opposition p. 10) Manejwala's assumption that this case raises only matters of general public interest is wrong, however. Petitioners did not seek relief because Respondents performed an abortion in Tennessee and that this tangential act has caused some vague harm. On the contrary, Ashley Blackard seeks damages because an abortion was performed upon her without obtained valid consent and she and her parents seek further relief because of the effect this battery has had upon family relations. It would be an unconscionable result to find that Tennessee adequately represented the very personal and important interests of Petitioners and that they are precluded from presenting their own arguments and claims. The arguments and cases proffered by Respondent Manejwala on this point are therefore unpersuasive. Also, on appeal, the Sixth Circuit agreed with the District Court, holding the Blackards were not bound by

Judge Nixon's injunction (Pet. App. 17a). Respondents have not filed a cross petition raising this issue, decided adversely to them below. The issue is not fairly subsumed in the Questions Presented as framed by either Petitioners or Respondents, and is therefore not properly before the Court. *See* Supreme Court Rule 14.1(a).

CONCLUSION

For the reasons stated herein, Petitioners Michael Blackard, Sharon Blackard, and Ashley Blackard respectfully request that this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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